

Interim Draft Outreach and Consultation Plan Federal Water Quality Standards for Waters in Indian Country

Purpose

This document describes EPA's plan for outreach and consultation with tribal governments, tribal organizations, states, and state organizations concerning the development of an advanced notice of proposed rulemaking (ANPRM), and potentially a proposed rule, to establish Federal water quality standards for waters in Indian country. This draft outreach and consultation plan was developed to be used during three specific phases of this work: Phase 1 addresses the period prior to publication of an advanced notice of proposed rulemaking (ANPRM), which is the Phase we are in right now; Phase 2 will occur during the ANPRM comment period; and Phase 3 would occur during preparation of a proposed rule. EPA will develop a separate outreach and consultation plan to cover the period following publication of the proposed rule.

This draft plan is subject to change pending comments from tribes, states and EPA Program Offices and Regions, and the development of Regional outreach and consultation plans.

Issue

Under the Clean Water Act, states and authorized tribes have the responsibility for adopting water quality standards. In 1987, Congress amended the Clean Water Act to add, in section 518(e), a provision that allows EPA to treat an Indian tribe in the same manner as a state for purposes of various Clean Water Act provision, including water quality standards under section 303. In 1991, EPA promulgated a regulation establishing a process for tribes to adopt their own water quality standards for waters within Indian reservations. To date, only 23 Indian tribes have water quality standards in place under the Clean Water Act. There is a gap in water quality protection under the Clean Water Act for those Indian country waters where EPA has neither promulgated specific Federal water quality standards nor explicitly found tribal or state jurisdiction to promulgate WQS under the Clean Water Act. Tribal reservations without approved water quality standards account for as much land area as all of New England plus the State of New Jersey. EPA does not expect that the proportion of tribes with EPA-approved water quality standards will increase significantly in the near future. EPA prefers that tribes develop and adopt their own water quality standards. However, in light of the important protection afforded by water quality standards, EPA is seeking additional means to expedite coverage of water quality standards. For more information on water quality standards and why they are important, please see www.epa.gov/waterscience/standards/tribal.

Background

In 1998-2000 EPA, in consultation with over 235 tribal representatives and EPA's Tribal Caucus, developed the concept of promulgating Federal water quality standards as a way to protect Indian country waters currently without water quality standards applicable under the Clean Water Act. EPA also met with interested state representatives. During the consultations, EPA received a mix of opinions on the issues involved in such a promulgation.

On January 19, 2001, Administrator Carol Browner signed a proposed rule to promulgate “core” Federal standards in Indian country except where tribes “opt out” to develop or work with EPA on specific standards. “Core” standards would include the basic provisions of standards as a first step that could be interpreted and supplemented with more detail at a later date. On January 22, 2001, EPA withdrew that proposal to allow Administrator Christine Whitman to review it.

What are EPA’s Plans for Moving Forward to Provide Federal Water Quality Standards for Waters in Indian Country?

EPA believes that further discussion is warranted on possible approaches for establishing water quality standards for waters in Indian country. EPA is developing an advance notice of proposed rulemaking (ANPRM) in order to obtain early comment on issues associated with a possible promulgation of Federal water quality standards for waters in Indian country that do not have water quality standards in effect under the Clean Water Act. This ANPRM will request comments on options and provisions for promulgating Federal standards and for improving water quality protection in Indian country. It will also request relevant information on any waters of Indian country where the absence of water quality standards may be hindering the restoration and maintenance of water quality. The ANPRM will also provide a basis and allow the necessary time for EPA to consult further with tribes and states on possible approaches. EPA plans to consider all comments before deciding whether to propose any particular approach for the promulgation of Federal water quality standards for waters in Indian country.

What is an ANPRM?

An Advance Notice of Proposed Rulemaking is a pre-rulemaking action that is generally intended to determine whether a federal agency should initiate rulemaking. ANPRMs allow regulatory agencies to structure a national debate around a focused set of issues by openly and objectively presenting options and issues. An ANPRM does not predetermine any outcome and allows an agency to reserve its decision on whether to propose and finalize revisions to regulations. Before EPA signature, the ANPRM package is reviewed by the Office of Management and Budget prior to publication in the Federal Register. While the public comment period for an ANPRM generally ranges from 60-180 days, EPA anticipates that the public will likely have at least 180 days to provide comments once this ANPRM is published.

Consultation with Tribal Governments

Any discussion of consultation with tribal governments should first acknowledge the Federal government’s trust responsibility and its government-to-government relationship with tribal governments. EPA’s 1984 Indian Policy states “The Agency, in keeping with the Federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect reservation environments.” This outreach and consultation plan is designed in part to implement this responsibility. As described below, the consultation requirements of Executive Order 13175, entitled *Consultation and Coordination With Indian Tribal Governments* (65 FR 67249, November 9, 2000) are limited to particular types of action. However, EPA in implementing its Indian policy conducts many outreach and consultation efforts beyond the scope of

Executive Order 13175. The development of this ANPRM is one of the instances where EPA thinks it is important to maintain continuous dialogue with tribes, although this is not required under the Executive Order.

The goals of Executive Order 13175, entitled *Consultation and Coordination With Indian Tribal Governments* (65 FR 67249, November 9, 2000), are to (1) establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, (2) to strengthen the United States government-to-government relationships with Indian tribes, and (3) to reduce the imposition of unfunded mandates upon Indian tribes. In addition, among other things, the Executive Order requires EPA to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. “Tribal officials” are defined in the Executive Order as “elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.” “Policies that have tribal implications” are defined in the Executive Order as regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. The term “consult” is not defined in Executive Order 13175, and EPA guidance on complying with the Executive Order has not been finalized.

As described above, an ANPRM merely poses questions for comment, and has no “direct effects” as described in the Executive Order. Although consultation with tribes under the Executive Order is not required prior to publication of the ANPRM, EPA is committed to maintaining open and meaningful dialogue with tribal governments and therefore will conduct numerous outreach and consultation activities to ensure tribes are aware of the ANPRM and obtain feedback from tribes where possible.

Pending final description by EPA in its guidelines for implementing the Executive Order, for the purposes of this plan, and this plan only, “consultation” is defined as a meaningful and timely two-way exchange between tribal officials and EPA officials to provide for open sharing of information, the full expression of tribal and EPA views, a commitment to consider tribal views in decision-making, and respect of tribal self-government and sovereignty.

For this plan, wherever feasible given the resource constraints of the Agency, outreach and consultation should be in the form most preferred by each tribe. The form of outreach and consultation may include the following:

- One or more public meetings.
- Letters to all federally-recognized tribes.
- Face-to-face meetings with interested tribes or groups of tribes where feasible.
- Telephone calls or video conferences with tribal officials.
- Written communication (electronic or by mail).
- Meetings with states and state organizations such as ASIWPCA.
- Meetings with Regional Tribal Operations Committees and other national tribal conferences.
- Meetings with EPA’s Tribal Caucus.
- Advertisements or articles in Indian Country Today newspaper and tribal newsletters.
- Website with current information.

Consultation with States

Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), requires (among other things) EPA to develop an accountable process to ensure “meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” As described above, an ANPRM merely poses questions for comment, and has no “substantial direct effects on the States” as described in the Executive Order. Although consultation with states under the Executive Order is not required prior to publication of the ANPRM, EPA is committed to maintaining open and meaningful dialogue with states and therefore will conduct numerous outreach activities during Phase 1 to ensure states are aware of the ANPRM and get feedback from states where possible.

Phase 1: Prior to ANPRM Publication (June-November 2003)

The purpose of Phase 1 is to reach out to tribes, states and other interested representatives about the ANPRM, and to obtain expert input on the drafting of the ANPRM. The drafting of the ANPRM text will be complete by the end of August in order for EPA to complete the development and review process in November. Due to the short time frame, EPA will be taking advantage of meetings planned in various Regions during this period to reach out to tribes, states and other interested representatives. During this phase, the Regions will also work with tribes to determine how each tribe wants to be consulted with during Phase 2. The activities included in Phase 1 are:

- Briefed EPA’s Tribal Caucus (June 10) and e-mailed ANPRM fact sheet (June 17).
- Tribal Caucus appointed three members to work with the rulemaking work group on drafting the ANPRM. Conference calls with designated members on May 30, June 17, July 10, and August 5.
- Announcement at National Congress of American Indians (June 16).
- Letters to Tribal (Co-)Chairs of the Regional Tribal Operations Committees with fact sheet (July 8) and draft ANPRM text, questions and answers, and this draft plan (August).
- Letter to all federally-recognized tribal governments enclosing the ANPRM fact sheet (August).
- Regional meetings with tribes:
 - ▶ Region 5 conference call with tribes (June 17)
 - ▶ Region 1 conference call with tribes (July 21)
 - ▶ Region 9 Tribal Operations Committee meeting (July 30-August 1, Klamath, CA)
 - ▶ Region 10 outreach and consultation meeting with tribes on the Washington water quality standards revisions, held at the office of the Northwest Indian Fisheries Commission (August 5, Lacey, WA), with videoconferencing to the NWIFC office in Forks, WA, and Mt. Vernon, WA
 - ▶ Region 5 EPA meeting with Michigan Tribal Environmental Group (August 5)
 - ▶ Northeast Regional Conference of the Native American Fish and Wildlife Society (August 5-7, Messena, NY)

- ▶ Region 10 outreach and consultation meeting with tribes on the Washington water quality standards revisions, held at the office of the Upper Columbia River United Tribes (August 12, Spokane, WA)
- ▶ Region 8 Tribal Operations Committee meeting (August 19-21, New Town, ND)
- ▶ Region 5 Tribal Operations Committee meeting (September 3, WI)
- Additional information posted on the following website:
www.epa.gov/waterscience/standards/tribal.
- The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) designated four members to work with the rulemaking work group on drafting the ANPRM. Conference call with designated members on July 16 and August 5. Subsequent calls are planned.

Phase 2: During ANPRM Comment Period (December-May 2004)

The purpose of Phase 2 is to reach out to a broad set of entities including individual tribes and groups of tribes, states and state organizations, and other entities, to obtain input and comment on the ANPRM that EPA published for public review. The Regions will take the lead in conducting outreach and consultations with tribes, with participation from Headquarters where feasible. The activities included in this phase are:

- Meetings with individual tribes or groups of tribes (face-to-face where possible).
 - ▶ e.g., Region 5 Regional Tribal Operations Committee meeting (December 3, Chicago, IL)
- Presentations and/or focus groups with tribal organizations such as EPA's Tribal Caucus, Regional Tribal Operations Committees, National Congress of American Indians, National Tribal Environmental Council and Native American Fish & Wildlife Society.
- Meetings with states and state organizations such as ASIWPCA.
- One or more public meetings.
- Advertisements or articles in Indian Country Today newspaper and tribal newsletters.
- Website with current information.
- Letters to all federally-recognized tribes.

Phase 3: During Preparation of Proposed Rule (May 2004-?)

The purpose of Phase 3 is to reach out to individual tribes and groups of tribes, states and state organizations, and other entities, to obtain input and comment on EPA's evaluation of comments received from the public on the ANPRM, and comments and concerns raised to EPA's attention during Phase 2. The Phase 3 outreach and consultation will help EPA evaluate those public comments that EPA has received, further evaluate options described in the ANPRM, and evaluate whether and how to proceed towards any proposed rulemaking. The activities included in this phase are:

- Meetings with individual tribes or groups of tribes (face-to-face where possible).
- Meetings with states and state organizations such as ASIWPCA.

- Presentations and/or focus groups with tribal organizations such as EPA's Tribal Caucus, Regional Tribal Operations Committees, National Congress of American Indians, National Tribal Environmental Council and Native American Fish & Wildlife Society.
- Website with current information.

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